

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 October 2004

Case No.: 2003BLA05700

In the Matter of

WALLACE GLENN RICE
Claimant

v.

LESLIE RESOURCES INC.
Employer

ZURICH AMERICAN INSURANCE GROUP
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:

Monica Rice Smith, Esq.
For the Claimant

Carl Brashear, Esq.
For the Employer

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

Mr. Rice attended the formal hearing held October 7, 2003, in Hazard, Kentucky. I afforded both parties the opportunity to offer testimony, question witnesses, to introduce evidence and thereafter, closed the record. I based the following Findings of Fact and

Conclusions of Law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, EX and CX refer to the exhibits of the Director, the employer and claimant, respectively.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

Wallace Glenn Rice filed this claim for benefits on May 23, 2001. (DX 2). He had previously filed a claim on April 20, 2000, but that claim was withdrawn as of April 11, 2001. The District Director denied benefits under the instant claim stating that Mr. Rice failed to show:

1. That he has pneumoconiosis as defined by the Act and the regulations;
2. That his pneumoconiosis arose out of coal mine employment;
3. That he is totally disabled due to pneumoconiosis. (DX 22).

Failure to establish any one of these elements will result in denial of the claim. *Hall v. Director, OWCO*, 2 B.L.R. 1-1998 (1980). Claimant timely appealed the Director's Proposed Decision and a hearing in this matter was held before the undersigned.

Remaining Issues

The parties contest the responsible operator issue, the existence of pneumoconiosis and its causation as well as the fact that the miner is totally disabled due to coal mine employment. (TR 11).

Factual Background

Mr. Rice, born July 25, 1949, claims to have worked in the Nation's coal mines for approximately 12 years. (DX 3). The Director found nine years of coal mine employment. (DX 22). During his employment, he performed work as a truck driver hauling coal. (DX 5). He last worked in the coal mines around September 20, 1998 after a mining accident. He completed high school and is currently married to Ciddie "Stidham" Rice. (DX 3). He claims an additional dependent, his daughter Kendra Suzanne Rice, who is a full time student and was born on February 2, 1982. DX 3).

Work History

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of proof in establishing the length of his coal mine work. *See Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984); *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859, 1-862 (1978). The length of a miner's coal mine work history must be computed as provided by 20 C.F.R. § 725.101(a)(32). *See* 20 C.F.R. § 718.301.

Claimant contends that he worked in the mines for approximately twelve years but offered no other proof or testimony to substantiate this assertion. *Supra*. His social security earnings records reflect nine years of employment in the Nation's coal mines. (DX 9). Consequently, I find that Claimant has established nine years of coal mine employment.

Responsible Operator

Employer contests its liability as the responsibility operator under the Act. Twenty C.F.R. Section 725.491 defines a responsible operator:

- (a) For purposes of this part, the term "operator" shall include:
 - (1) Any owner, lessee, or other person who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine; or
 - (2) Any other person who:
 - (i) Employs an individual in the transportation of coal or in coal mine construction in or around a coal mine, to the extent, such individual was exposed to coal mine dust as a result of such employment (see Sec. 725.202)...

Where claimant testified to being a truck driver and to hauling coal for the employer in dusty condition, I find that Employer meets the above regulatory definition of "operator." Furthermore, based on Claimant's Social Security earnings statements, Employer paid this miner for at least one day after December 31, 1969. Additionally the named operator employed Claimant as a miner for not less than one year based on his Social Security records. I also note that this Employer is the most recent employer of Claimant, having employed him from 1995 to 1998. The records reflect no subsequent mining employment by Claimant. Therefore, I find that Employer is the responsible operator for this claim.

Medical Evidence

Medical evidence submitted with a claim for benefits under the Act is subject to the requirement that it must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See*, 20 C.F.R. §§ 718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. § 725.414. The regulations provide that claimants are limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy, and two medical reports as affirmative proof of their entitlement to benefits under the Act. § 725.414(a)(2)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports, and physician opinions that appear in one single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test, or arterial blood gas study. § 725.414(a)(2)(ii). Likewise, the district director is subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i-iii).

Here, the District Director submitted the director-sponsored pulmonary examination report of Dr. Hussain along with a 'quality only' reading by Dr. Sargent. The Claimant submitted the rebuttal x-ray, to the reading of Dr. Hussain, by Dr. Alexander. (CX 1). Employer then submitted the medical report of Dr. Dahhan and two rebuttal x-ray interpretations by Drs. Poulos and Dr. West. (EX 1, 2, 3). However, under 20 C.F.R. § 725.414(a)(2)(ii), only one rebuttal interpretation is permitted for the same x-ray. Consequently, one of these rebuttal interpretations will be excluded from consideration. As both rebuttal interpretations reached the same conclusion and were interpreted by physicians with the same qualifications and on the same date, I will utilize the first one appearing in the record, that of Dr. West.

A. X-ray reports

<u>Exhibit</u>	<u>Date of X-ray</u>	<u>Date of Reading</u>	<u>Physician/Qualifications</u>	<u>Interpretation</u>
DX 13	12/19/01	12/19/01	Hussain	Negative / 1 quality
DX 13	12/19/01	02/22/02	Sargent/BC & B-reader	1 quality read only
EX 2 (R)	12/19/01	05/19/03	West/BC & B-reader	Negative, quality 2
CX 1 (R)	12/19/01	07/08/03	Alexander/BC & B-reader	1/1, quality 2 – slightly underexp'd
EX 1	04/10/03	04/10/03	Dahhan/B-reader	Negative, quality 1

B. Pulmonary Function Studies

<u>Exhibit/Date</u>	<u>Physician</u>	<u>Age/Height</u>	<u>FEV₁</u>	<u>FVC</u>	<u>MVV</u>	<u>FEV₁/FVC</u>	<u>Tracings</u>	<u>Comments</u>
DX 13	Hussain	52/74	3.41pre 3.28*	3.76 4.18*	94	91% 78%*	Yes Yes	Poor effort
EX 1	Dahhan	53/74.75	3.88	4.41	69	88%	Yes	Good effort/coop

*testing after administration of bronchodilator

C. Arterial Blood Gas Studies

<u>Exhibit</u>	<u>Date</u>	<u>Physician</u>	<u>pCO₂</u>	<u>pO₂</u>	<u>Resting/ Exercise</u>	<u>Comments</u>
EX 1	04/10/03	Dahhan				Claimant did not perform-stated would be ill.
DX 13	12/19/01	Hussain	37.1 32.6	68 106	Resting Exercise	

D. Narrative Medical Evidence

The Director provided a medical summary, a chest x-ray, blood gas studies and pulmonary function tests conducted by Imtiaz Hussain, M.D., Board certified in Internal Medicine with a subspecialty in pulmonary diseases. (DX 13). Dr. Hussain conducted a complete physical examination, work history, medical history, and pulmonary function analysis and arterial blood gas studies on December 19, 2001. *Id.* His examination revealed normal thorax and lung functions including normal bronchi bilaterally on auscultation. *Id.* According to Dr. Hussain, the chest x-ray, pulmonary function tests (poor effort noted) and the arterial blood gas studies were all normal. He did not diagnose any respiratory impairment but did note “hypoxemia” from the arterial blood gas studies. He stated that Claimant retains the respiratory capacity to return to coal mine employment.

The Employer submitted a consultative report of the examination of Mr. Rice conducted by A. Dahhan, M.D. (EX 1). Dr. Dahhan is board-certified in pulmonary and internal medicine. *Id.* Prepared on April 10, 2003, the report includes a medical examination, smoking (non-smoker) and work history (15 years of truck driving aboveground), medical history and analysis of the objective medical tests as outlined above. *Id.* The physical examination showed no clubbing or edema, and good air entry into both lungs with no crepitation, rhonchi or wheeze. *Id.* Also noting Mr. Rice’s non-smoker status, Dr. Dahhan reported a daily cough with clear productive sputum. Mr. Rice reported that an intermittent wheeze but does not use bronchodilators and that he suffers dyspnea on exertion such as when climbing stairs. *Id.*

Dr. Dahhan opined that Mr. Brown does not have pneumoconiosis or any other pulmonary impairment based on a negative chest x-ray showing clear lungs (but cardiac enlargement) and normal pulmonary function tests. In his opinion, Mr. Brown retains the respiratory capacity to return to his previous coal mining employment, although he does experience essential hypertension and cervical disc post-laminectomy. (EX 1).

DISCUSSION AND APPLICABLE LAW

Pneumoconiosis and Causation

Section 718.202 provides four means by which pneumoconiosis may be established: by chest x-ray, a biopsy or autopsy, by presumption under §§ 718.304, 718.305 or 718.306, or if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the

miner suffers from pneumoconiosis as defined in § 718.201.¹ 20 C.F.R. § 718.202(a). Pneumoconiosis is defined in § 718.201 as a chronic dust disease arising out of coal mine employment. It is within the administrative law judge's discretion to determine whether a physician's conclusions are adequately supported by documentation. *Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46, 1-47 (1985). "An Administrative Law Judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *See King v. Consolidation Coal Co.*, 8 B.L.R. 1-262, 1-265 (1985).

The X-ray Evidence:

Under section 718.202(a)(1), a finding of pneumoconiosis may be based on x-ray evidence. The submitted evidence contains two x-rays and one quality reading. Both Claimant and Employer submitted rebuttal interpretations of the December 2001 x-ray. The April 2003 x-ray, interpreted by B-reader Dr. Dahhan as negative, I find to be probative evidence weighing against a finding of pneumoconiosis. The December 2001 x-ray received one positive interpretation by a dually qualified reader and two negative interpretations – one by a dually-qualified reader and one by a B-reader. I find that the preponderance of the readings for this x-ray weigh against a finding of pneumoconiosis. In sum, the two x-rays do not support a finding of pneumoconiosis.

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(b)(2) provides several criteria for establishing total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (b)(2)(ii), total disability may be established with qualifying pulmonary function studies or arterial blood gas studies.²

¹ Only the X-ray evidence and the physicians' opinions are applicable under these facts. Section 718.202(a)(2) is inapplicable herein because there are no biopsy or autopsy results. Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of the several presumptions is found to be applicable. In the instant case, Section 718.304 does not apply because there is no x-ray, biopsy, autopsy or other evidence of large opacities or massive lesions in the lungs. Section 718.305 is not applicable to claims filed after January 1, 1982. Section 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.

² A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A "non-qualifying" test produces results that exceed the table values.

Pulmonary Function Tests

All ventilatory studies of record, both pre-bronchodilator and post-bronchodilator, must be weighed. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). To be qualifying, the FEV₁ as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1-154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study, which is not accompanied by three tracings, may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). In addition, little or no weight may be accorded to a ventilatory study where the miner exhibited “poor” cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984); *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547 (1981).

The evidence consists of non-qualifying pulmonary function tests and therefore, total disability is not established.

Arterial Blood Gas Studies

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984).

The record contains one arterial blood gas study. The reports indicate no contradiction of the regulatory quality standards, and consequently, I accord this blood gas probative weight on the issue of total disability. This study did not produce qualifying values. Thus, the preponderance of the arterial blood gas study evidence weighs against a finding of total disability.

Medical Opinions

Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions, as discussed earlier under section 718.202(a)(4). In assessing total disability under § 718.204(c)(4), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, Case No. 99-3469 (6th Cir. 2000) (a finding of total disability may be made by a physician who compares the exertional requirements of the miner's usual coal mine employment against his physical limitations); *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993) (a qualified opinion regarding the miner's disability may be given less weight). *See also Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990)(en banc on recon.). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a prima facie finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

As discussed above, there are two reports in the record and neither opines that the Claimant is disabled. Therefore, I find that the medical opinion evidence does not support a finding of total disability due to pneumoconiosis.

Conclusion

After a review of the record in its entirety, the conditions of entitlement have not been met and, therefore, the claim of Mr. Wallace Rice is denied.

Attorney's Fees

The award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS:

Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board **within thirty (30) days** from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board, Suite 500, 800 K. Street, N.W., Washington, DC 20001-8001. 20 C.F.R. §725.481. A copy of a Notice of Appeal must also be served upon Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Francis Perkins Bldg., Room N-2605, 200 Constitution Avenue, N.W., Washington, DC 20210.